

**DECISION**

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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-206442**DATE:** March 17, 1983**MATTER OF:** Linde Construction**DIGEST:**

1. When competitive bidding is a condition to local housing authority's receipt of Federal funds, authority must follow certain basic principles of Federal procurement law and may award contract only to lowest responsible bidder.
2. When purpose of subcontractor listing is to permit evaluation of bidder's ability to meet affirmative action and equal employment opportunity provisions of solicitation, local housing authority may consider listed subcontractors' hiring records in making responsibility determination.
3. When extensive subcontracting is proposed, local housing authority may reasonably require identification of all proposed subcontractors before award and may consider information about them in making responsibility determination.
4. When two lowest bidders in procurement by local housing authority fail adequately to demonstrate ability of proposed subcontractors to meet hiring goals for women and minorities, housing authority reasonably may find them nonresponsible and make award to third-low bidder, regardless of increased cost; it is not obliged to delay award indefinitely while bidders attempt to cure information deficiencies.

Linde Construction, the second-low bidder for construction of 42 units of new, scattered site housing under a solicitation issued by the Housing Authority of

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Omaha, Nebraska, complains concerning rejection of its bid for failure to demonstrate the ability of proposed subcontractors to meet local hiring goals for women and minorities. Linde contends that award of a contract at a price nearly \$200,000 higher than that of the low bidder was improper. We deny the complaint.

Background:

The housing project, No. NE26-P001-019, is being constructed under an agreement between the Housing Authority and the Department of Housing and Urban Development (HUD), which will provide loans and annual contributions in accord with the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1437b (1976) and 1437c (Supp. IV 1980). The total development cost for the project is estimated at \$2,244,197.

In a solicitation issued August 21, 1981, the Housing Authority sought bids for construction of all 42 units; bids on fewer units also were solicited, but award ultimately was made for construction of the entire project. At opening on October 13, 1981, the lowest bids on this basis were:

D.A. Construction	\$1,248,344
Linde Construction	1,388,500
F&H Construction	1,432,350

In addition to the standard provisions included in all HUD-assisted contracts for low rent public housing, the solicitation contained a 9-to-10 percent hiring goal for women and minorities in each construction trade. Although this figure already had been adopted by signers of the Omaha Hometown Plan (an agreement between labor organizations and minority groups), all bidders were required to commit themselves to it and to include the goal in all sub-contracts.

The solicitation stated that in selecting the "lowest and best" bidder,<sup>1</sup> the Housing Authority would consider bidders' records in employing women and minorities. Bidders therefore were required to submit Non-Discrimination

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<sup>1</sup>The Nebraska Housing Authority Law requires contracts to be awarded to the "lowest and best" bidder. IV Revised Statutes of Nebraska, § 71-1521 (1981).

Qualification Information forms, showing the total number of their employees and the number and percentage of women and minorities in each of 17 different trades (bricklayers, carpenters, painters, plasterers, and the like) for the previous calendar quarter. The solicitation stated that this requirement would be extended to all subcontractors before they were approved.

For three major categories--mechanical, electrical, and roofing subcontractors--bidders also were required to list names and dollar amounts in their bid documents. The successful bidder was required (a) to award these subcontracts unless HUD or the Housing Authority rejected one or more of the firms listed; (b) to obtain Housing Authority approval before awarding any other subcontracts; and (c) to provide the Housing Authority with a list of other subcontractors within 2 days after award.

Because each of the three lowest bidders proposed to subcontract extensively, however, the Housing Authority's construction committee, apparently on its own initiative, decided to evaluate hiring records of all proposed subcontractors before selecting the prime contractor. The record indicates that the committee requested names and non-discrimination information on October 28, 1981; all three bidders responded, and none appears to have objected to doing so.

After reviewing these submissions, the committee, on November 6 and 11, 1981, rejected certain proposed subcontractors and requested further information on others. It advised bidders that if prospective subcontractors did not have women and minorities in their current workforce, they must either have a recent history of employing these groups, as shown by payroll or other documents for the past 12 months, or must be new, family-operated, or small businesses, all very narrowly defined. On November 12, 1981, the committee recommended that the Housing Authority award a contract to F&H, finding that the subcontractors proposed by the two lower bidders could not be approved. The Housing Authority, however, delayed action in order to meet with D.A. and Linde on November 16, 1981, and give them a further opportunity to demonstrate their subcontractors' qualifications. Following this meeting, the full Housing Authority voted to make award to F&H; with HUD approval, a contract was executed on February 9, and a notice to proceed issued on March 29, 1982.

Linde's Complaint:

Linde complains of the award to F&H at a cost of nearly \$200,000 more than the low bid price, suggesting that this constitutes misappropriation of Federal funds.

HUD, citing Howard Electric Company, 58 Comp. Gen. 303 (1979), 79-1 CPD 137, argues that the Housing Authority's rejection of Linde was tantamount to a finding of nonresponsibility, at least with regard to the firm's proposed subcontractors. The agency maintains that the Housing Authority had a reasonable basis for its decision and that the award was fully in accord with applicable Federal law and regulations.

Linde's response may be summarized as follows: that its own financial ability, judgment, integrity, and skills, i.e., responsibility, has never been questioned; that all of its proposed subcontractors either had employed women and minorities or fell within one of the exceptions listed by the Housing Authority; and that in any event, the successful bidder was not required to identify subcontractors until 2 days after award.

GAO Analysis:

Although a local housing authority is not subject to the same statutes and regulations as an agency making a direct Federal procurement, HUD's Annual Contributions Contract states that in the award of contracts, a housing authority must "give full opportunity for open and competitive bidding" and make award only to the lowest, responsible bidder. Since competitive bidding is therefore a condition to receipt of Federal financial assistance, a housing authority must follow certain basic principles of Federal procurement law. See Curtiss Development Co. and Shipco, Inc., 61 Comp. Gen. 85 (1981), 81-2 CPD 414.

The first question for our consideration is whether the Omaha Housing Authority's consideration of subcontractor hiring records was inconsistent with these principles. For the following reasons, we do not believe that it was.

In its solicitation, the Housing Authority required a listing of major subcontractors. Although initially it

would appear that the purpose of this listing was to prevent bid shopping, the Housing Authority's actions in this case make it clear that the real purpose of the listing was to permit evaluation of bidders' and subcontractors' ability to meet or make good faith efforts to meet affirmative action and equal employment opportunity goals. The Housing Authority's extension of the listing requirement to all proposed subcontractors, including those to whom the successful bidder would not actually be obligated to award subcontracts, was, as Linde points out, contrary to the terms of its solicitation. We do not, however, find this action arbitrary, capricious, or an abuse of the Housing Authority's discretion, particularly in view of the substantial amount of subcontracting expected. Linde, for example, listed more than 25 separate tasks that it planned to subcontract, many of them involving more than one subcontractor or supplier.

In our opinion, the Housing Authority had a rational basis for wishing to identify and review nondiscrimination information for these firms before award. Since its review was directed to the manner in which they proposed to perform, as distinguished from their actual commitment to the goals stated in the solicitation, it was a matter of responsibility, rather than responsiveness. See generally Donald W. Close Co. and others, 58 Comp. Gen. 298, 302 (1979), 79-1 CPD 134 (a direct Federal procurement); Titan Southern States Construction Corporation, B-189844, November 15, 1977, 77-2 CPD 371 (a grantee procurement). In direct Federal procurements, regulations permit consideration of the responsibility of prospective subcontractors before award if a substantial portion of the supplies or services to be provided will be subcontracted. See Federal Procurement Regulations § 1-1.1206(b) (amend. 95, August 1971); R.G. Robbins Company, Inc., B-187365, July 18, 1977, 77-2 CPD 33. We see no reason why this principle should not be extended to procurements by local housing authorities.

The next question is whether Linde was improperly rejected on the basis of the hiring records of its proposed subcontractors. We note that there was no requirement that proposed subcontractors actually employ 9-to-10 percent women and minorities; they needed only to show that they had employed some members of these protected classes during the past year or that their businesses were of a size or type that they had no opportunity to employ women and minorities.

We agree with the Housing Authority that Linde failed to adequately demonstrate that its proposed subcontractors met these criteria. Linde's proposed flooring subcontractor, for example, submitted a non-discrimination information form indicating that one of the two office workers that it employed was female, but that all other work was further subcontracted. Linde now contends that the firm's second-tier flooring subcontractors employed from 10-to-35 percent minorities; however, these proposed second-tier subcontractors have not been identified, and no payroll or other records have been submitted for them.

Linde's proposed subcontractor for rough carpentry wrote "no work last quarter" on its otherwise blank non-discrimination information form. Linde states that this subcontractor employed one female and four minority workers; however, there is no information in the record as to when or how long these individuals were employed. Linde's proposed masonry subcontractor provides another example: its form showed that it employed four bricklayers and two laborers, none minority, and one female clerical worker; however, Linde maintains that this is a family-owned firm that has had only three employees, all related, since its inception.

The Housing Authority, advising Linde of the reasons for its rejection in a letter dated December 8, 1981, pointed out these deficiencies and stated that it could not grant approval in several other cases because Linde had proposed more than one subcontractor for the same job and had not clearly identified or supplied data on the one it intended to use. The Housing Authority concluded that Linde's proposed subcontractors were not necessarily unsatisfactory, but that sufficient information, the gathering of which was Linde's responsibility, had not been provided.

We find this determination reasonable. Linde was on notice that very specific nondiscrimination information would be required and had ample opportunity to provide it. Linde failed to do so and instead, as late as November 9, 1981, was providing the Housing Authority with general statements about the low level of construction activity in the Omaha region and the fact that women and minorities were hard to find. Moreover, since the Housing Authority requested all three of the lowest bidders to provide

subcontractor information before award, all were treated equally and Linde could not have been prejudiced by the request.

In summary, we find (1) that the Housing Authority reasonably requested information on proposed subcontractors and (2) that Linde failed to supply this information in sufficient detail or with adequate documentation, providing a reasonable basis for a finding of nonresponsibility. Since the other, lowest bidder also was found nonresponsible, the Housing Authority properly awarded a contract to F&H, the third-low bidder. The Housing Authority was not obliged to delay selection of a prime contractor indefinitely while Linde attempted to cure the information deficiencies that led to its being found nonresponsible. See generally Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD 438 (a procurement by the District of Columbia Government).

Other Bases of Complaint:

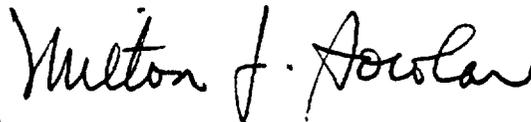
Linde's comments on HUD's report to our Office incorporate numerous other allegations initially made to the Housing Authority or to HUD: for example, that the Housing Authority failed to follow solicitation provisions which state that a contractor shall not be found in noncompliance with affirmative action and equal employment opportunity requirements solely on account of its failure to meet goals; that the individual heading the Housing Authority's construction committee is a union business agent, and his refusal to approve Linde's proposed subcontractors was based on the fact that they were non-union; and that the Housing Authority failed to advise Linde in writing within the 10 days stated in the solicitation of the reasons for rejection of its proposed subcontractors. In our opinion, Linde should have included these objections in its initial complaint to our Office, rather than presenting them in an untimely, piecemeal fashion. See Hispano American Corporation, B-200268, March 17, 1981, 81-1 CPD 201.

In any event, these bases of complaint are without legal merit. The solicitation provisions regarding affirmative action and equal employment opportunity cited by Linde indicate that the percentages stated in a solicitation are goals, not quotas to be achieved by every

contractor; they are not otherwise relevant here. Linde's allegations of bias in favor of union subcontractors are speculative, particularly in light of the fact that the full Housing Authority actually selected the contractor, with HUD approval. Linde therefore has not met its burden of proof on this point. See Engineering Service Systems, Inc., B-208553, September 27, 1982, 82-2 CPD 284. And we regard the Housing Authority's failure to provide written reasons for its rejection of Linde's proposed subcontractors within 10 days as a procedural defect of the type that does not affect the validity of the award.

Finally, the record indicates that on November 12, 1981, Linde refused to extend its bid for another 30 days, as requested by the Housing Authority. While Linde argues that its November 16 meeting with that group revived its bid, we question whether the Housing Authority could legally have made award to Linde at that time. In view of our above findings, however, we need not reach this question.

The complaint is denied.

*for*   
Comptroller General  
of the United States